FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-560

JO ANN EVANS GARDNER,
Petitioner
v.
WESTINGHOUSE BROADCASTING COMPANY,
Respondent
On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The unreported Memorandum Opinion and Order of the District Court For the Western District of Pennsylvania is printed in Appendix B to the Petition For Certiorari. (P. 34a-40a).[1] The opinion of the United States Court of Appeals for the Third Circuit (P. 2a-21a) and the opinion sur denial of rehearing en banc P. 22a-33a) are reported at 559 F.2d 209.

1. "P." refers to the Appendix to the Petition for Certiorari. "A." refers to the Appendix to Petitioner's Brief.

STATUTES INVOLVED

This case involves the interpretation and application of 28 U.S.C. § 1292(a)(1) which provides:

> (a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . . .

In particular, this case involves the question of appealability under 28 U.S.C. § 1292(a)(1) of an order denying certification of a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, 28 U.S.C. Fed.R.Civ.P. 23, which is set forth in Addendum A to this Brief. Also relevant to the Court's consideration of this case are the following statutes:

(1) 28 U.S.C. § 1291:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

(2) 28 U.S.C. § 1292(b):

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(3) The All Writs Act, 28 U.S.C. § 1651(a):

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

QUESTION PRESENTED

Is the denial of class certification immediately appealable under 28 U.S.C. § 1292(a)(1) as an interlocutory order refusing an injunction where no application for a preliminary injunction was ever made and preliminary injunctive relief was not even requested in the Complaint?

STATEMENT OF THE CASE

In January, 1972 Petitioner, Jo Ann Evans Gardner, applied for the position of talk show host at KDKA-Radio in Pittsburgh, Pennsylvania. This radio station is a subsidiary of Respondent, Westinghouse Broadcasting Company.[2] The record shows that Petitioner had no previous training or employment experience in broadcasting. (A. 122a-134a). Petitioner was not hired by KDKA-Radio.

Petitioner's charge of sex discrimination in employment which was filed with the Equal Employment Opportunity Commission ("EEOC") on April 19, 1972 listed only KDKA-Radio and not Respondent as the discriminating employer (A. 16a) On April 7, 1975 the EEOC sent Petitioner a notice of her right to institute suit. (A. 13a).

On May 20, 1975, more than three years after she had been denied employment, Petitioner filed this law-

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2. Respondent owns nine radio and five television stations throughout the United States, including the radio station known as KDKA-Radio and a television station known as KDKA-TV in Pittsburgh, Pennsylvania.

suit in the United States District Court for the Western District of Pennsylvania alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (Supp. 1975). Petitioner's Complaint claimed "broad-based" sex discrimination in all of the operations of Westinghouse Broadcasting Company and sought relief for Petitioner[3] and for members of a class she wished to represent. Particularly, she requested a permanent injunction against sex discrimination, back pay, money damages, other appropriate relief and counsel fees. (A. 14a-15a). Petitioner did not then, nor has she ever, sought a preliminary injunction for herself or for the class generally pursuant to Fed.R.Civ.P. 65.

Petitioner filed a "Motion to Determine a Class Action" on July 9, 1975. The District Court allowed discovery regarding the question of class action status and, following a hearing, Petitioner's motion was denied in a memorandum opinion and order dated February 4, 1976. (P. 34a-40a). The District Court specifically found that Petitioner did not meet the standards of Fed.R. Civ.P. 23(a)(2), (a)(3) and (a)(4) requiring common questions of law and fact, typicality and fair and adequate protection of the putative class. (P. 38a-39a).

Without seeking or obtaining a certificate from the District Court pursuant to 28 U.S.C. § 1292(b), Petitioner filed an appeal with the Court of Appeals for the Third Circuit. She asserted that the Court of Appeals had jurisdiction under 28 U.S.C. § 1292(a)(1).

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3. In Petitioner's answer to Interrogatories to Plaintiff, No. 4, she stated her primary reason for bringing the suit was to secure employment for herself. (A. 121a).

Respondent's motion that the Third Circuit dismiss the appeal for lack of jurisdiction was granted in an opinion and judgment order dated June 6, 1977. The opinion is reported as *Gardner v. Westinghouse Broadcasting Co.*, 559 F.2d 209 (3rd Cir. 1977).

On December 5, 1977, this Court granted the petition for a writ of certiorari and directed that this case be heard in tandem with *Coopers & Lybrand v. Cecil Livesay and Dorothy Livesay* and *Punta Gorda Isles, Inc., et al. v. Cecil Livesay and Dorothy Livesay,* filed at No. 77-1836 and No. 77-1837, respectively.

SUMMARY OF ARGUMENT

The instant case presents the fundamental issue whether a district court's order denying class action status in a lawsuit seeking permanent, but not preliminary, injunctive relief is immediately appealable under 28 U.S.C. § 1292(a)(1) as an interlocutory order refusing an injunction.

This Court repeatedly has recognized that the final judgment rule enacted by Congress lies at the foundation of the federal system of appellate review. The non-appealability of interlocutory trial court orders protects litigants against the costs and burdens of piecemeal appeals, avoids disruption and delay of trial court proceedings and prevents the inundation of already overworked appellate courts by a stream of appeals from non-final orders.

Congress enacted § 1292(a)(1) as a limited exception to the final judgment rule in order to ensure immediate review of non-final injunctive orders of "serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176, 181 (1955). Immediate appeal as of right is thus provided in § 1292(a)(1) to protect litigants against an erroneous injunctive order which has a direct, immediate and irreparable impact on the merits of the controversy that an appellate court might be unable to remedy if review were delayed until final judgment. To be appealable under this provision, an order must actually grant or deny an injunction at the time it is rendered.

An order refusing to certify a class in a purported class action is not a denial of injunctive relief. In denying class certification, a district court does not rule on

the entitlement of the class to injunctive relief. Rather, the class certification decision involves a determination of whether the putative class exists and whether the named plaintiff is a proper representative thereof. A denial of class action status has no direct consequences on the merits of the dispute but is simply a procedural order which results in the litigation proceeding to trial as an individual action.

Furthermore, an order denying class certification does not necessarily limit the scope of any injunction which might eventually be granted. The trial court may later decide to certify the class or permit intervention by members of the putative class, or it may grant injunctive relief that would benefit all members of the putative class. Moreover, unlike a grant or refusal of preliminary injunctive relief which is immediately reviewable under § 1292(a)(1), an erroneous denial of class certification may be adequately reviewed after judgment on the merits under 28 U.S.C. § 1291. Finally, immediate review of an adverse class determination is available in appropriate circumstances under 28 U.S.C. § 1292(b) or by writ of mandamus.

Thus, an order denying class action status is not a refusal of an injunction, and the Third Circuit properly ruled that it had no jurisdiction to hear this appeal under § 1292(a)(1).

ARGUMENT

I. There Is a Strong and Well Justified Policy in Favor of the Final Judgment Rule of Appealability.

Petitioner contends that she may, as a matter of right, appeal from a denial of class certification merely because she included a request for a permanent injunction in her prayer for relief. An analysis of the policies underlying the final judgment rule is helpful to an understanding of why Petitioner's contention is without merit.

The final judgment rule has always been the "dominant rule" in federal appellate practice. *DiBella v. United States,* 369 U.S. 121, 126 (1962). This Court repeatedly has stressed that "there has been a firm Congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy." *Abney v. United States,* 431 U.S. 651, 656 (1977). *Accord, Goldstein v. Cox,* 396 U.S. 471, 478 (1970); *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176, 178 (1955).

Adherence to the rule of finality avoids the delay and expense caused by piecemeal litigation. *Catlin v. United States,* 324 U.S. 229, 234 (1945).[4] Avoidance of delay is crucial because "[t]o be effective, judicial administration must not be leadenfooted." *Cobbledick v. United States,* 309 U.S. 323, 325 (1940).

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4. Such delay has been characterized as an unqualified evil which causes an increase in settlement pressures and an improvement in the bargaining position of undeserving litigants. Carrington, *Crowded Dockets and the Court of Appeals: The Threat to the Function of Review and the National Law,* 82 Harv. L. Rev. 542, 554 (1969).

The final judgment rule also prevents the disruption of orderly trial proceedings by discouraging "undue litigiousness." *DiBella, supra,* 369 U.S. at 124. In this manner, the final judgment rule protects litigants from the "harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." *Cobbledick, supra,* 309 U.S. at 325.

In addition to protecting litigants from the expenses and delay of piecemeal appeals, the finality principle protects the integrity and viability of the federal court system. "It is the means for achieving a healthy legal system." *Cobbledick, supra,* 309 U.S. at 326. The final judgment rule provides a means by which appellate courts can more knowledgeably exercise their review function. Interlocutory appeals force appellate courts to review trial court proceedings with which they are unfamiliar on the basis of an incomplete record. Sometimes even different panels of the same court may be required to perform that function on separate interlocutory appeals. Appellate review after the entry of final judgment provides a single panel with the means of making a fully informed review of the proceedings before the trial court. "The opportunity given the reviewing court to view the entire controversy with the perspective the completed proceedings provides enhances the likelihood of sound review." *Parkinson v. April Industries, Inc.,* 520 F.2d 650, 652 (2d Cir. 1975).

In addition, the final judgment rule helps preserve a healthy legal system by maintaining the appropriate relationship between appellate and district courts. A refusal to allow interlocutory appeals enables a trial court to control the litigation before it and prevents unwarranted appellate court interference in trial court proceedings. *Parkinson, supra,* 520 F.2d at 652. Increased appellate court involvement in proceedings at the district court level caused by interlocutory appeals is a matter of serious concern. It has been suggested that such interference causes litigants and the public to lose respect for, and confidence in, the capabilities of federal district judges.[5]

The final judgment rule provides a sound means of preserving a healthy legal system. Such a rule limits the absolute number of appeals in the federal court system. The conservation of judicial resources and energy is an important benefit derived from the limitation on the number of appeals imposed by the final judgment rule. Furthermore, such a limitation on appeals is crucial because it ensures that appellate deliberations will be characterized by quality and not quantity.

Petitioner now seeks to erode the final judgment rule despite its long history and proven wisdom. Her attack comes at a time when the sheer number of cases presented for appellate review attracts the concern of the judiciary, the bar and the general public.

A study prepared under the auspices of the American Bar Foundation in collaboration with the Appellate Judges' Conference has suggested that increased conges-

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5. Professor Wright has noted:

> "[I]ncreased review is likely to lead to quite tangible public dissatisfaction. Every time a trial judge is reversed, every time the belief is reiterated that appellate courts are better qualified than trial judges to decide what justice requires, the confidence of litigants and the public in the trial courts will be further impaired." Wright, *The Doubtful Omniscience of Appellate Courts,* 41 Minn. L. Rev. 751, 781 (1957).

tion at an appellate court level threatens the effectiveness of review, as follows:

> "As time passes the backlogs grow, playing havoc with the performance of all appellate judicial functions. Every purpose served by the appellate judicial process is frustrated by the resulting delay in rendering decisions: justice between litigants is defeated; guidance to the citizenry, the bar, and the lower courts is unavailable; development of the law is slowed. Hasty decision on appeals, on the other hand, can produce similar consequences: there is less assurance that the parties will receive justice, and the quality of growth in the law will be lowered. When dockets become crowded, there is an inevitable conflict between volume and quality." R. Leflar, Internal Operating Procedures of Appellate Courts 9 (1976).

Such demands on limited appellate resources threaten to transform appellate review from an informed deliberation into a "processing" procedure.[6]

The current workload in the federal court system has already become sufficiently burdensome that the potential threat to the effectiveness of appellate review should not be ignored.[7]

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6. It has been suggested that an increasing workload poses a similar threat to the historic and essential functions of this Court. Federal Judicial Center's *Report of Study Group on the Caseload of the Supreme Court,* 57 F.R.D. 573 (1972).

7. The following discussion of the workload of the federal court system is made in terms of percentage rates of change rather than absolute figures. This was done in an attempt to provide a view of trends in the federal court system. Citations are made with reference to the location of the absolute figures upon which the rate of change computations were made.

At the district court level, the number of civil cases filed during the 1977 fiscal year is 111.2% greater than the number of civil cases filed in 1962.[8] The number of civil cases pending has increased at an even greater rate. For the same time period (1962-77), the number of civil cases pending has increased by 126.0%.[9]

The number of class actions pending at the district court level has doubled in the five-year period since 1972.[10] Class actions[11] place a more significant burden on the federal court system and litigants than is indicated solely by an examination of the mere number of such lawsuits.[12] The federal judicial system's difficulty

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8. 1977 Annual Report of the Director of the Administrative Office of the United States Courts 80. Such reports are hereinafter cited as Annual Report preceded by the year.

9. *Id.*

10. 1977 Annual Report 121; 1973 Annual Report 177. The Administrative Office of the United States Courts does not provide data concerning class actions at the appellate court level. Information concerning such actions at the district court level is available and would appear to be an accurate indication of workload trends confronted by the courts of appeals.

11. Employment discrimination suits constituted 34.6% of the total number of civil class actions filed during the 1976 and 1977 fiscal years. 1977 Annual Report 126.

12. Since 1975, pending class actions have constituted 4.3% of all pending civil cases. 1977 Annual Report 121. This figure understates the strain on judicial resources imposed by class actions. For example, in a study of antitrust class action suits, it was found that class actions tend to pend longer, involve considerably more discovery, and accumulate 1.6 times the number of docket entries per day of pendency. DuVal, *The Class Action As An Antitrust Device: The Chicago Experience, (I),* 1976 A.B.F. Res.J. 1023, 1041-42 (1976).

in handling that burden is demonstrated by the fact that pending class actions at the district court level have increased at a rate nearly four times greater than the rate of increase in the filing of such actions during the 1973-1977 time period.[13]

The congestion problem at the federal appellate level is even more severe.[14] During the 1977 fiscal year, the number of appellate court filings was 296.4% greater than the number of appellate court filings in 1962.[15] The number of appellate cases pending during the same time period has increased by 409.5%.[16] The severity of the burden at the appellate level becomes most apparent when the workload status of particular Circuits is examined. Since 1961, the number of appellate cases pending has increased by greater than 600% in more than half the Circuits.[17]

On the basis of data prepared for the Federal Judicial Center, Judge Friendly has explained the disproportionate increase in the appellate court workload:

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13. Since 1973, class action filings have increased by 18.8% while pending class actions have increased by 67.2%. 1977 Annual Report 121; 1973 Annual Report 177.

14. For example, pending actions per district judgeship have increased by 37.0% since 1971. Pending actions per appellate judgeship have increased during the same time period at a rate of 67.4%—a rate of increase almost twice as great as that at the district court level. 1977 Management Statistics for United States Courts 13, 127; 1976 Management Statistics for United States Courts 13, 127.

15. 1977 Annual Report 65a.

16. *Id.*

17. Such an increase has taken place in the following Circuits: Third, Fourth, Fifth, Sixth, Ninth and Tenth. 1977 Annual Report 65b.

> "[A]n increase in the number of filings in the district courts would be bound to mean a more than corresponding increase in appeals. Figures that have been recently produced are throwing more light on what has caused an increase in appeals . . . . This has not been so much an increase in the appeal rate which, . . . remained relatively static for civil cases taken as a whole (although with dramatic contrasts for particular categories), as a *doubling of the ratio of appealable civil judgments to total terminations.*" Friendly, *Averting the Flood By Lessening the Flow,* 59 Cornell L. Rev., 634, 649-50 (1974) (emphasis supplied).

Acceptance of Petitioner's argument in the present case necessarily would accelerate this increased workload trend in the federal appellate courts. All lawsuits containing class allegations and requests for injunctive relief, regardless of the propriety of such allegations or requests for relief, would present at least two stages of appealability as of right. Every district court denial, or even narrowing, of the class status sought by a plaintiff would become automatically appealable. Of course, every plaintiff would be entitled to appeal a second time when the district court entered a final judgment on the merits. Actually, if this Court were to accept Petitioner's argument that failure to grant the class sought by a plaintiff is appealable under 28 U.S.C. §1292(a)(1) because it has an adverse impact on the scope of the injunction which is prayed for in the complaint, most plaintiffs would have many more than two occasions on which they could appeal since there are many rulings other than class determinations which can have an

adverse impact upon the ultimate scope of a possible injunction.[18]

Thus, Petitioner advocates a departure from the firm policy of the final judgment rule at a time when the entire legal profession is attempting to devise ways to avoid the staggering burdens imposed on the federal court system, as well as the parties, by the ever-increasing federal court workload.[19] As we now discuss, such a departure is not justified by the wording of § 1292(a)(1), by prior precedent in the interpretation and application of this provision, by congressional policy, or by any other consideration.

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18. As discussed *infra,* discovery orders, rulings upon the admissibility of testimony, and many other procedural rulings may have an effect upon the scope of any possible injunction.

19. *See, e.g., Chief Justice Burger's 1977 Report to the American Bar Association,* 63 A.B.A.J. 504 (April 1977); Friendly, *Averting the Flood By Lessening the Flow,* 59 Cornell L. Rev. 634 (1974).

II. Section 1292(a)(1) Is a Limited Exception to the Final Judgment Rule and Is Not Applicable to the Present Appeal.

A. The Third Circuit Was Correct in Its Holding That the Denial of Class Action Status Is Not Appealable Under § 1292(a)(1).

The Third Circuit in the present case properly dismissed the appeal from the District Court's interlocutory order denying Petitioner's motion for class action status. The Third Circuit correctly held that an adverse class action determination order is not appealable under § 1292(a)(1) as the denial of an injunction. A trial court order denying class action status does not refuse an injunction. Such an interlocutory order does not determine the merits of a party's claim for injunctive relief. It simply indicates that the requirements of Fed. R.Civ.P. 23 have not been satisfied. As the Third Circuit explained:

> "A decision on class status is wholly procedural .... [I]t does not implicate the merits of the case at all. If, after judgment on the merits, the relief granted is deemed unsatisfactory, *the question of class status is fully reviewable.* The delay involved is the same delay that accompanies review of all interlocutory procedural rulings in a case, and the delay in no way diminishes the power of the court upon review to afford full relief." *Gardner v. Westinghouse Broadcasting Co.,* 559 F.2d 209, 212 (3rd Cir. 1977) (emphasis supplied).

The consistent position of the Third Circuit[20] has been that class action determination orders are appealable, in appropriate circumstances, under 28 U.S.C. § 1292 (b). *E.g., Gardner, supra,* 359 F.2d at 214; *Katz v. Carte Blanche Corp.,* 496 F.2d 747, 752 (3rd Cir.) (en banc), *cert. denied,* 419 U.S. 885 (1974).

Other Circuits have reached the same conclusion as the Third Circuit in holding that interlocutory orders denying class action status are not appealable as interlocutory orders refusing an injunction. Both the Second Circuit in *Williams v. Wallace Silversmiths, Inc.,* 566 F.2d 364, 365 (2d Cir. 1977),[21] and the Court of Appeals

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20. Petitioner has incorrectly characterized the Third Circuit's pre-*Gardner* approach to appealability under § 1292(a)(1) of orders denying class action status. [Petitioner's Brief at 39-40 n.13] For example, prior to *Gardner,* the Third Circuit, relying on *Hackett v. General Host Corp.,* 455 F.2d 618 (3rd Cir.), *cert. denied,* 407 U.S. 925 (1972), dismissed an appeal under § 1292(a)(1) from an interlocutory order which had granted class action status of a narrower scope than that requested by the plaintiff. *Piper v. Westinghouse Electric Corp.,* No. 74-1711 (3rd Cir. June 17, 1975).

21. The plaintiff in *Williams v. Wallace Silversmiths, supra,* sought both monetary damages and a permanent injunction. Petitioner has attempted to distinguish that case on the grounds that injunctive relief was not the heart of the complaint in the lawsuit. [Petitioner's Brief at 38 n.12]. Petitioner has not explained why that distinction is meaningful. Petitioner's argument that a denial of class action status is appealable as a refusal of an injunction would appear to be equally applicable to all cases seeking injunctive relief irrespective of whether such relief was the heart of the complaint. Otherwise, acceptance of Petitioner's argument would require an appellate court to determine whether injunctive relief was the heart of the remedy sought before ruling on its jurisdiction to hear the appeal.

for the District of Columbia in *Williams v. Mumford,* 511 F.2d 363, 369 (D.C. Cir.), *cert. denied,* 423 U.S. 828 (1975), have dismissed appeals of adverse class action determination orders under § 1292(a)(1) and have characterized the construction of this provision advanced by Petitioner here as "an unwarranted expansion of the statutory language."[22]

The Eighth Circuit in two recent cases has reserved the question whether an order denying class action status is appealable under § 1292(a)(1).[23] Nevertheless, in *Donaldson v. Pillsbury Co.,* 529 F.2d 979 (8th Cir. 1976) (per curiam), *cert. denied,* 46 U.S.L.W. 3218 (October 3, 1977), the Eighth Circuit held that an interlocutory order refusing to reconsider a prior adverse class action determination order is not appealable under this statute. Past decisions interpreting appealability under other exceptions to the finality rule embodied in § 1292(a) similarly indicate that the Eighth Circuit is not receptive to attempts to extend those limited exceptions beyond their express terms.[24]

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22. The Seventh Circuit has indicated that in a case such as the instant lawsuit, where the plaintiff has not requested a preliminary injunction, there would be no appeal as of right from the order denying class action status. *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.,* 538 F.2d 164, 166 n.2 (7th Cir.) (en banc), *cert. denied,* 429 U.S. 986 (1976).

23. *Johnson v. Nekoosa-Edwards Paper Co.,* 558 F.2d 841, 844 (8th Cir. 1977); *Donaldson v. Pillsbury Co.,* 529 F.2d 979, 981 (8th Cir. 1976) (per curiam), *cert. denied,* 46 U.S.L.W. 3218 (October 3, 1977).

24. For example, the Eighth Circuit in *Florida v. United States,* 285 F.2d 596, 600 (8th Cir. 1960), held that an interlocutory order authorizing a receiver to gather assets and records was not appealable under

We submit that the cases cited in Petitioner's Brief at 36-37 for the proposition that an interlocutory order denying class action status is appealable under § 1292 (a)(1) were wrongly decided. For the reasons which follow, the Third Circuit, in the instant case, was clearly correct in its refusal to accept the unwarranted expansion of the statutory language of § 1292(a)(1) advocated by Petitioner.

B. An Order Does Not Constitute the Grant or Denial of an Injunction Under §1292(a)(1) Even Though It May Ultimately Affect the Scope of Injunctive Relief.

The grant of appellate jurisdiction embodied in § 1292(a)(1) is a limited and narrow exception to the final judgment rule. *E.g., Donaldson, supra,* 529 F.2d at 981.

The long-established rules of statutory construction require a narrow reading of the exception to the finality principle provided by § 1292(a)(1). As this Court explained in *Spokane & Inland Empire R.R. v. United States,* 241 U.S. 344, 350 (1916):

> "[E]xceptions from a general policy which a law embodies should be strictly construed."

This "canon of construction must be applied with redoubled vigor when the action sought to be reviewed

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§ 1292(a)(2) as an "interlocutory order appointing a receiver" for the following reasons:

> "Appellants argue that the . . . order is in practical effect the appointment of a receiver. The answer to this contention is that statutes authorizing interlocutory appeals are to be strictly construed. Changes in appeal jurisdiction should be made by appropriate legislation, not by judicial modification."

here is an interlocutory order of a trial court." *Goldstein v. Cox,* 396 U.S. 471, 478 (1970).

In addition to this basic principle of statutory construction, the history of § 1292(a)(1) suggests that Congress intended this provision to be a very limited exception to the final judgment rule of appealability. The following review of the detailed consideration of the history of §1292(a)(1) set forth in *Baltimore Contractors, Inc. v. Bodinger,* 348 U.S. 176 (1955), illustrates the limited exception Congress intended this statute to provide.

In 1891, the Evarts Act created an exception to the final judgment rule in situations "where, upon a hearing in equity . . . an injunction shall be granted or continued by an interlocutory decree. . . ." 26 Stat. 828 (1891). In 1895, this provision was amended to provide immediate appealability "where, upon a hearing in equity . . ., an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree or an application to dissolve an injunction shall be refused. . . ." 28 Stat. 666-67 (1895).[25] For uncertain reasons, the 1895 version was repealed five years later. 31 Stat. 660 (1900). In 1911, the 1895 formulation for immediate appealability was reenacted. 36 Stat. 1134 (1911). The

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25. The Congressional purpose for the 1895 revision has been explained in *Stewart-Warner Corp. v. Westinghouse Electric Corp.,* 325 F.2d 822, 830 (2d Cir. 1963) (Friendly, J., dissenting), *cert. denied,* 376 U.S. 944 (1964), as follows:

> "[I]t seems rather plain that Congress was thinking primarily of the case where erroneous denial of a *temporary* injunction may cause injury quite as irreparable as an erroneous grant of one." (emphasis in original).

words "in equity" later were deleted from the reference to "upon a hearing in equity" in the statute. 43 Stat. 937 (1925).[26] In 1948, the words "upon a hearing" also were inexplicably deleted from the statute. 62 Stat. 929 (1948).[27]

This Court in *Baltimore Contractors* summarized the history of §1292(a)(1) in the following manner:

> "No discussion of the underlying reasons for modifying the rule of finality appears in the legislative history, although the changes seem plainly to spring from a developing need to permit litigants to effectually challenge *interlocutory orders of serious, perhaps irreparable, consequence.*" *Baltimore Contractors, supra,* 348 U.S. at 181 (emphasis supplied).

In accordance with the limited purpose of this statute and the above-mentioned rule of statutory construction, this Court has stated that it has a responsibility to ensure that the limited exception to the finality rule provided by § 1292(a)(1) is applied as written by

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26. This Court has declared that this deletion "was not intended to remove that limitation." *Schoenamsgruber v. Hamburg American Line,* 294 U.S. 454, 457 n.3 (1935). Judge Friendly argues that this limitation "strongly suggest[s]" that § 1292(a)(1) is limited to orders granting or denying temporary injunctive relief. *Stewart-Warner, supra,* 325 F.2d at 830. *Accord, Chappel & Co. v. Frankel,* 367 F.2d 197, 203-04 (2d Cir. 1966) (en banc).

27. Relying on this Court's decision in *Fourco Glass Co. v. Transmirra Products Corp.,* 353 U.S. 222, 227-228 (1957), Judge Friendly has stated that this deletion also was not intended to make substantive changes in the statute. *Stewart-Warner, supra,* 325 F.2d at 830.

Congress and not construed in a manner that would result in an unwarranted expansion of appellate court jurisdiction. *Baltimore Contractors, supra,* 348 U.S. at 181. In order to ensure that no unwarranted expansion of appellate court jurisdiction will take place, it is "better judicial practice to follow the precedents which limit appealability of interlocutory orders, leaving Congress to make such amendments as it may find proper." *Baltimore Contractors, supra,* 348 U.S. at 185. Indeed, such judicial deference to proper legislative functions is appropriate. As this Court has observed:

> "When the pressure rises to a point that influences Congress, legislative remedies are enacted. The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants. When countervailing considerations arise, interested parties and organizations become active in efforts to modify the appellate jurisdiction . . . ." *Baltimore Contractors, supra,* 348 U.S. at 181.[28]

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28. The Interlocutory Appeals Act of 1958 [28 U.S.C. § 1292(b)], which was enacted three years after this Court's decision in *Baltimore Contractors,* is an example of such legislative modification of appellate jurisdiction.

A more recent example is the Department of Justice's proposals for reform of class action procedures. Section 5 of the Department of Justice's Draft Statute would amend § 1292(a) by adding a fifth subsection to that provision. This amendment would grant appellate jurisdiction from interlocutory orders of district courts which refuse to permit certain actions to proceed as class actions. [1977] ANTITRUST & TRADE REG. REP. (BNA) (No. 842, Dec. 8, 1977) F-6. This is merely a recent example of the fact that Congress con-

Appellate jurisdiction should be limited to appeals from district court interlocutory orders which are expressly authorized by § 1292(a)(1) because of the narrow exception to the finality rule which this grant of jurisdiction was intended to provide. Appellate jurisdiction of appeals from district court orders which deny class action status is not specifically provided for in § 1292(a)(1). "In the absence of clear and explicit authorization of Congress, piecemeal appellate review is not favored." *Goldstein, supra,* 396 U.S. at 478.

Petitioner argues that appellate jurisdiction under § 1292(a)(1) should be extended to appeals from district court orders which deny class action status in cases where a complaint contains a prayer for permanent injunctive relief. Petitioner's theory is that denial of class status may narrow the scope of the injunctive relief which may eventually be awarded. [Petitioner's Brief at 38-39]. She argues that § 1292(a)(1) jurisdiction lies because, under her theory, an adverse impact upon the ultimate scope of a possible injunction results whenever a district court refuses to certify any class or certifies a class narrower than that sought by the plaintiff.

Such an expansive construction is inconsistent with the fundamental nature and purpose of § 1292(a)(1) which allows interlocutory review of only those orders which directly and immediately grant or refuse injunctive relief. The purpose of the modification of the finality rule embodied in § 1292(a)(1) was "to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Baltimore Contrac-*

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tinues to have the legislative option of revising § 1292(a) to provide for review of class action determination orders if it so desires.

tors, supra, 348 U.S. at 181. The serious and irreparable consequences which justify direct interlocutory appeal involve the immediate substantive impact of the orders rather than their eventual procedural effects. *See Chappel, supra,* 367 F.2d at 203.

Regardless of its ultimate impact on the conduct of the litigation, a denial of class action status does not have immediate and irreparable consequences vis-a-vis the merits of the case. As was explained in the opinion of the Third Circuit:

> "We understand the conceptual basis of the theory advanced by Ms. Gardner. She argues that the ultimate injunctive relief in a successful action may be narrower if class status is denied than if class status were granted. But this effect will occur, if at all, only after a decision on the merits of the prayer for injunctive relief. Prior to that time, an order denying a class certification does not 'touch on the merits of the claim' nor does it have 'final and irreparable effect on the rights of the parties.' In sum, a class determination, affirmative or negative, lacks the immediate and drastic consequences which attend an injunction and which form the basis for excepting injunctive rulings from the final judgment rule." *Gardner, supra,* 559 F.2d at 213.

The crux of Petitioner's argument is that the denial of class action status has adversely affected Petitioner's ability to prepare a record upon which the District Court could order injunctive relief for members of the putative class. More specifically, Petitioner argues that such denial has restricted Petitioner's ability to obtain discovery and present evidence at trial. [Petitioner's Brief at 32]. This argument is without merit, for it ignores

the fact that discovery and trial evidentiary rulings in her case would not be appealable prior to final judgment under any view of appellate jurisdiction.

Many types of interlocutory orders of a trial court have a significant impact on a litigant's ability to obtain the relief sought. Such considerations, however, have not been viewed as sufficient grounds for contravening the strong and explicit Congressional policy against piecemeal appeals. As this Court declared in *City of Morgantown, West Virginia v. Royal Insurance Co.*, 337 U.S. 254, 258 (1949):

> "It is argued that the importance of an interlocutory order denying or granting jury trial is such that it should be appealable. Many interlocutory orders are equally important, and may determine the outcome of the litigation, but they are not for that reason converted into injunctions."

Interlocutory orders issued by a district court which direct or deny discovery, for example, are not immediately appealable. *E.g., Alexander v. United States,* 201 U.S. 117 (1906); *Time, Inc. v. Ragano,* 427 F.2d 219, 221 (5th Cir. 1970) ("The order does not constitute an interlocutory injunction within 28 U.S.C.A. § 1292(a) because that subsection does not encompass protective orders entered under the discovery rules."); 4 Moore's Federal Practice ¶ 26.83[3], at 585 (2d ed. 1976). Professor Moore has observed that the many attempts by litigants to make discovery orders immediately appealable by converting them into orders granting or denying an injunction have met with "general failure." 9 Moore's Federal Practice ¶ 110.20[1], at 233 (2d ed. 1975).[29]

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29. Such discovery orders have been viewed as nonappealable interlocutory orders despite the important impact that such orders have on litigants. In holding that a trial court order directing a witness to answer certain deposition questions was not appealable under either § 1291 or § 1292, the Third Circuit explained the competing policy considerations in the following manner:

> "Every interlocutory order involves, to some degree, a potential loss. That risk, however, must be balanced against the need for efficient federal judicial administration as evidenced by the Congressional prohibition of piecemeal appellate litigation. To accept the appellant's view is to invite the inundation of appellate dockets with what have heretofore been regarded as nonappealable matters. It would constitute the courts of appeals as second-stage motions courts. . . ." *Borden Co. v. Sylk,* 410 F.2d 843, 846 (3rd Cir. 1969).

District court evidentiary rulings are likewise not subject to interlocutory review.[30] The opinion of the Third Circuit in this case cited evidentiary rulings as an example of important interlocutory decisions which are not appealable:

> "We do not deny the importance of the class action determination in many cases. . . . But the possible effects of a ruling are not determinative of whether it can be immediately appealed. Evidentiary rulings, for example, can be critically important but

30. "A litigant may not appeal each adverse evidentiary ruling separately and by itself." *Merino v. Hocke,* 324 F.2d 687, 689 (9th Cir. 1963). The basis for nonappealability of such evidentiary rulings has been explained as follows:

> "Rulings rendered during the course of trial are paradigms of nonfinality. Immediate appeal would be grossly disruptive of any orderly trial process. Review must await entry of a final judgment." Wright, Miller & Cooper, Federal Practice and Procedure: *Jurisdiction* § 3915, at 591 (1976).

they are not the proper subject of an interlocutory appeal." *Gardner, supra,* 559 F.2d at 212.

In the course of holding that an order denying a post-indictment motion to return papers and suppress evidence obtained therefrom was not immediately appealable, this Court in *Cogen v. United States,* 278 U.S. 221, 223-224 (1929), reviewed the considerations involved in the appealability of what was essentially an evidentiary ruling to suppress evidence unconstitutionally obtained. This Court declared:

> "Usually the main purpose of the motion for the return of papers is the suppression of evidence at the forthcoming trial of the cause. The disposition made of the motion will necessarily determine the conduct of the trial and may vitally affect the result. In essence, the motion resembles others made before or during a trial to secure or suppress evidence. . . . The orders made upon such applications, so far as they affect only rights of parties to the litigation, are interlocutory. . . . It is only when disobedience happens to result in an order punishing criminally for contempt, that a party may have review by appellate proceedings before entry of the final judgment in the cause." (citations omitted).

In addition to discovery orders and evidentiary rulings, there are other types of trial court orders which vitally affect the litigation and the scope of available relief but are not appealable prior to final judgment.[31]

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31. For example, a ruling on a motion for transfer of venue under 28 U.S.C. §§ 1404(a) or 1406(a) is not appealable as a grant or denial of injunctive relief. *E.g., M. Spiegel & Sons Oil Corp. v. B.P. Oil Corp.,* 531 F.2d 669, 670 (2d Cir. 1976) (per curiam); 9 Moore's Federal Practice ¶ 110.20[1], at 233 (2d ed. 1975).

A district court order, even if phrased in mandatory or prohibitive terms, is not appealable as an interlocutory order granting or refusing an injunction unless it actually grants or refuses all or part of the requested injunctive relief. *See* 9 Moore's Federal Practice ¶ 110.20 [1], at 233-234 (2d ed. 1975).

In sum, a district court's interlocutory order must actually grant or deny an injunction to be appealable under § 1292(a)(1). The fact that a trial court order has a substantial impact on the litigation and may narrow the scope of available relief generally has not been viewed as a sufficient reason for allowing immediate appeal of such an interlocutory order. As the Court of Appeals for the District of Columbia stated in *Williams v. Mumford,* 511 F.2d 363, 369 (D.C. Cir.), *cert. denied,* 423 U.S. 828 (1975):

> "It is argued that the net effect of the refusal to certify a class action is considerably to narrow the scope of any possible injunctive relief in the event plaintiffs ultimately prevail on the merits. Appellants cite in support of their position two cases from other Circuits: *Brunson v. Board of Trustees* and *Yaffee v. Powers.* Both cases are premised on the assumption that the refusal to certify a class action, since it would eventually affect the scope of equitable relief, itself constituted a modification of or a refusal to issue an injunction. We view this as an unwarranted expansion of the statutory language."[32]

In seeking to have this Court embrace an "effective"

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32. Petitioner also suggests that § 1292(a)(1) should be extended to interlocutory orders denying class action status because immediate review might avoid an unnecessary trial and its attendant expense. [Petition-

grant or denial standard of appealability under § 1292 (a) (1), Petitioner incorrectly asserts that decisions of this Court hold that other orders which do not expressly grant or deny an injunction are nevertheless appealable under this statute. [Petitioner's Brief at 21-28, 35-36]. Those decisions of this Court cited by Petitioner to support this assertion involved trial court orders of essentially two basic categories: (1) either the grant or refusal to hear a party's equitable claim or action in

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er's Brief at 52-54]. Such considerations have never been viewed as a sufficient basis for contravening the finality rule. Immediate review of an interlocutory order denying a motion for summary judgment might prevent an unnecessary trial and its related expense. Nevertheless, this Court has held that a trial court order denying a summary judgment because of the existence of an unresolved issue of fact is not appealable under § 1292 (a) (1). *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966). This Court has likewise held that an order refusing to stay an action for an accounting pending arbitration is not appealable as the denial of an injunction despite the fact that an immediate appeal could have avoided the considerable expense of a possibly unnecessary proceeding. *Baltimore Contractors, supra,* 348 U.S. at 186 (Black, J., dissenting). Similarly, immediate appellate review does not exist from a trial court order which grants a motion for a new trial. *E.g., Evans v. Calmar S.S. Co.*, 534 F.2d 519 (2d Cir. 1976); *Wiggs v. Courshon,* 485 F.2d 1281 (5th Cir. 1973).

Moreover, there is no right to interlocutory appeal of an order *granting* class certification. Nevertheless, such an order, if ultimately reversed, results in far greater unnecessary expense than does a later-reversed denial of class certification. Beyond the inherent costs and delays which result from any retrial, there are the irreparable costs of the more extensive discovery and the more complex and prolonged litigation in an improperly certified class action which cannot be redressed by reversal on appeal.

advance of a claim or action at law involving common or interlocking issues;[33] and (2) the complete dismissal of a claim or a party—or the entry of a summary judgment in favor of a claim or party—in lawsuits seeking injunctive relief.[34] These two types of interlocutory

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33. This request may arise through motions to hear equitable claims before legal claims, to stay an equitable or legal action, or to grant a jury trial in an action commenced in equity which involves a legal counterclaim.

34. The decisions of this Court relied upon by Petitioner which come within the former category are: *Baltimore Contractors, supra*; *City of Morgantown, West Virginia v. Royal Insurance Co.*, 337 U.S. 254 (1949); *Ettelson v. Metropolitan Life Insurance Co.*, 317 U.S. 188 (1942); *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449 (1935); *Enelow v. New York Life Insurance Co.*, 293 U.S. 379 (1935). The sole decision cited by Petitioner in the latter category is: *General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S. 430 (1932).

Two decisions of this Court cited by Petitioner in support of her proposition—that interlocutory orders which do not expressly grant or deny an injunction can be appealed under § 1292(a) (1)—do not fall into either of these categories. *Liberty Mutual Insurance Co. v. Wetzel,* 424 U.S. 737 (1976); *George v. Victor Talking Machine Co.*, 293 U.S. 377 (1934). Neither decision supports Petitioner's argument. In *Wetzel*, this Court noted in dictum that "it might be argued" that a plaintiff could appeal from a decision on the merits which failed to grant injunctive relief, but it held that in any event the defendant who had taken the appeal in that case could not raise this argument. The dictum simply recognized the existence of an argument which was found not to be before the Court. In *George,* the interlocutory decree from which an appeal was taken under § 1292 (a) (1) did expressly grant an injunction so the court was not confronted with the question of whether an order which indirectly had such an effect would be appealable.

orders are inherently different than a denial of class action status and, therefore, do not support an extension of the explicit language of § 1292(a)(1) to appeals from trial court orders denying class action status.

This Court has reviewed a series of five cases involving the appealability of an interlocutory order where a trial court essentially grants or refuses to give initial consideration to an equitable claim or action. The resolution of these cases was grounded in the historic differences between equity and law and the need to protect a litigant's right to a jury trial.[35] Due to their unique historic basis, these decisions should be viewed as *sui generis,* and they therefore do not provide support for Petitioner's argument that adverse class action determination orders are appealable under § 1292(a)(1) as orders "effectively" denying injunctive relief. Furthermore, a close reading of these decisions mandates a rejection of Petitioner's argument.

A chronological comparison of these five cases reveals the extent to which their resolution was grounded on the historic differences between law and equity. In the three earliest decisions,[36] this Court essentially held that a trial court order granting or refusing to hear equitable claims first was appealable under § 1292(a)(1) where the lawsuit was commenced on the basis of a claim at law. Where the original lawsuit was based on equitable claims, however, the two most recent de-

35. *See* 9 Moore's Federal Practice ¶ 110.20[3], at 240-246 (2d ed. 1975); Note, *Appealability in the Federal District Courts,* 75 Harv. L. Rev. 351, 371-74 (1961).

36. *Ettelson, supra*; *Shanferoke Coal, supra*; *Enlow, supra.*

cisions of this Court[37] found that similar refusals to defer consideration of an equitable action pending arbitration or to defer consideration of an equitable claim so that a jury trial could be held on a legal counterclaim were not so appealable.[38]

Regardless of whether the lawsuit was commenced on the basis of claims at law or equity, the issuance in these five cases of trial court orders essentially granting or refusing to hear equitable claims or actions prior to claims or actions at law had the same "effect"—they determined whether the equitable claims or actions would be initially considered by the trial court.[39] Despite the fact that the trial courts' orders had the same "effect" in each of these cases, this Court reached different conclusions on the question of the appealability of these interlocutory orders under § 1292(a)(1) or its statutory predecessor. This Court based its resolution of the appealability issue upon the historic rules involving potential conflicts between courts of law and equity. No such historic rules are present in the instant case. In this regard, the present case is quite similar to *Baltimore Contractors.* Since the refusal in that case to stay an accounting pending arbitration was not appealable as

37. *Baltimore Contractors, supra*; *City of Morgantown, supra.*

38. Rather, the trial court orders were found to be simply "ruling[s] as to the manner in which he [trial judge] will try one issue in a civil action pending before himself." *City of Morgantown, supra,* 337 U.S. at 257.

39. The fact that the trial court orders from which an appeal was taken had the same effect in all five cases was made clear in the dissenting opinions by Justice Black in the latter two decisions. *See, Baltimore Contractors, supra,* 348 U.S. at 185-186; *City of Morgantown, supra,* 337 U.S. at 262.

a denial of an injunction, it would appear *a fortiori* that the denial of class action status in the instant case is not appealable under § 1292(a)(1). Thus, Petitioner has mistakenly relied on the five decisions of this Court under discussion to support her incorrect argument that an "effective" grant or denial of injunctive relief is the proper standard for appealability under § 1292(a)(1).[40]

In fact, these five decisions of this Court dictate the rejection of Petitioner's argument. When determining appealability under § 1292(a)(1), lower courts and litigants have been cautioned by this Court that its earlier decisions should be viewed in the context of the historic distinctions between law and equity so as to restrict piecemeal appeals. As this Court declared in *Baltimore Contractors, supra,* 348 U.S. at 184-185:

> "The reliance on the analogy of equity power to enjoin proceedings in other courts has elements of fiction in this day of one form of action. . . . The distinction has been applied for years, however, and we conclude that *it is better judicial practice to follow the precedents which limit appealability of interlocutory orders,* leaving Congress to make such amendments as it may deem proper." (emphasis supplied).

Contrary to this Court's directive in *Baltimore Contractors,* Petitioner now attempts to rely on that line of case authority to expand such appealability. Petitioner's effort to so extend appealability under § 1292(a)(1) should be rejected because, as this Court declared in *City of Morgantown, supra,* 337 U.S. at 258:

> "[D]istinctions from common law practice which supported our conclusions in the *Enelow* and *Ettelson* Cases supply no analogy competent to make an injunction of what in any ordinary understanding of the word is not one."

Petitioner also has cited a second category of cases which found the following interlocutory orders to be immediately appealable: the complete dismissal of a claim or a party, and the entry of summary judgment in favor of a claim or party. Such interlocutory orders are inherently different than a trial court order denying class action status.

A class action determination order does not reach the merits, while dismissal or summary judgment orders actually grant or deny an injunction because they are entered by the trial court only after a final and unconditional determination on the merits that injunctive relief can or cannot be obtained in the pending lawsuit.

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40. The analysis of the Second Circuit in *M. Spiegel & Sons Oil Corp. v. B. P. Oil Corp.,* 531 F.2d 669, 670-671 (2d Cir. 1976) (per curiam), is instructive in this regard. In holding that a district court order refusing to stay or transfer an action was not appealable under § 1292(a)(1), the Second Circuit relied on *Baltimore Contractors* and *City of Morgantown,* stating:

> "[A]ppellant attempts to create an independent basis of jurisdiction through application of the so-called *Enelow-Ettelson* rule. . . . '[T]he practical effect of that rule is to permit, in certain actions, appeals from two kinds of orders: (1) orders granting or denying trial by jury; and (2) orders staying or refusing to stay pending actions until issues involved in them are referred to arbitration.' 9 Moore's Federal Practice ¶ 110.20[3], at 240. We, however, see little merit in further modifying § 1292(a)(1) through extension of this exception well beyond the narrow confines in which it historically has developed. . . ." (citations omitted).

The very decision of this Court cited by Petitioner makes this distinction clear. This Court in *General Electric Co. v. Marvel Rare Metals Co.*, 287 U.S. 430, 433 (1932), explained its holding that a dismissal of a counterclaim for injunctive relief was appealable under the statutory predecessor to § 1292(a)(1) as follows:

> "But by their motion to dismiss, plaintiffs themselves brought on for hearing the very question that, among others, would have been presented to the court upon formal application for an interlocutory injunction. That is, whether the allegations of the answer are sufficient to constitute a cause of action for injunction. And the court necessarily decided that upon the facts alleged in the counterclaim defendants were not entitled to an injunction."

Petitioner also relies on certain lower court cases to support her argument that some trial court orders which do not expressly grant or deny an injunction are appealable under § 1292(a)(1). [Petitioner's Brief at 42-43]. The lower court cases cited by Petitioner involving summary judgment or dismissal orders[41] are inherently different than orders denying class action status because the former orders are based on a determination on the merits and actually grant or deny injunctive relief. As the Second Circuit explained in *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 461 F.2d 1040, 1041 (2d Cir. 1972), which is relied on by Petitioner:

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41. We submit, for the reasons expressed throughout this brief, that those lower court decisions cited by Petitioner which allowed immediate appealability of interlocutory orders other than summary judgment or dismissal orders were incorrectly decided.

> "In granting in part defendant's motion for summary judgment, the district court's order in effect constituted a final denial on the merits of the injunctive relief prayed for by plaintiff. . . ."

A denial of class action status possesses none of the characteristics that make dismissal or summary judgment orders appealable as injunctions. Unlike such dismissal and summary judgment orders, an adverse class action determination order is not based on the merits of the case and does not pass on the legal sufficiency of any claims for injunctive relief. An order denying class action status is a procedural order which simply indicates that the requirements of Fed.R.Civ.P. 23 have not been satisfied; it does not adjudicate the merits of the case. *Gardner, supra,* 559 F.2d at 212.[42] The Third Circuit's distinction between procedural orders and orders based on the merits is grounded in this Court's decision in *Switzerland Cheese Association v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966). In holding that a denial of a motion for summary judgment was not appealable under § 1292(a)(1), this Court there declared:

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42. Petitioner attempts to blur this distinction by incorrectly characterizing the class action determination order by the District Court in the present case as "touching on the merits." [Petitioner's Brief at 29-30]. A review of the record in the present case reveals that the District Court properly limited its inquiry to the question of whether the criteria of Rule 23 were satisfied and did not reach the merits of Petitioner Gardner's claim. Furthermore, an expansion of the limited scope of § 1292(a)(1) is not a proper means for correcting a trial court's alleged abuse of its functions. As discussed *infra* at 67, the writ of mandamus is the proper and adequate avenue for remedying any alleged abuses.

> "[T]he denial of a motion for summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order. . . ."

An expansive construction of § 1292(a)(1) should not be readily adopted in view of the potential burden on the workload of the appellate court system that would result from the acceptance of Petitioner's argument. In *Switzerland Cheese, supra,* 385 U.S. at 24, this Court declared the following rule of judicial restraint concerning the interpretation of § 1292(a)(1).

> "[W]e approach this statute somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders."

To adopt Petitioner's argument that the "effect" of an interlocutory order not reaching the merits can render it appealable under § 1292(a)(1) would overburden the appellate courts with a broad new category of piecemeal appeals. The problem may be highlighted by a comparison of the result advocated by Petitioner with the holding of *Liberty Mutual Insurance Co. v. Wetzel,* 424 U.S. 737 (1976). In *Wetzel* this Court held that an order which granted judgment on the merits for plaintiffs without ruling on the request for injunctive relief was not appealable by defendants under § 1292(a)(1) despite its inherent effect on the ultimate availability of injunctive relief.

By contrast, under Petitioner's theory, every order arguably narrowing the scope of eventual relief would be immediately appealable as of right under § 1292(a)(1). For example, an order denying joinder of additional plaintiffs would arguably limit the scope of any eventual injunction. Likewise, orders dismissing some but not all causes of action on grounds short of the merits, such as lack of personal or subject-matter jurisdiction, improper venue, ripeness, mootness or abstention, would be immediately appealable insofar as they precluded injunctions relating to those causes of action. Petitioner in her brief emphasizes that the denial of discovery in this case was also an order possibly having the effect of limiting the scope of any possible injunction. [Petitioner's Brief at 32]. A rule of appealability based upon the eventual possible "effect" of an order thus has no easily definable limits and could be applied to a broad range of interlocutory orders.

Application of the "effective" grant or denial standard of appealability under § 1292(a)(1) would provide plaintiffs with numerous opportunities to obtain piecemeal review of interlocutory orders short of the merits. A rule permitting appeal as of right from all orders arguably narrowing the scope of possible injunctive relief would encourage plaintiffs to include prayers for injunctive relief in all cases[43] and to add nonjusticiable claims to their complaints or make dubious motions during the course of litigation so as to increase their opportunities for obtaining interlocutory appellate review. Such a practice would undermine the final judgment rule which, as articulated in *Wetzel,* can prevent even a judgment on the merits from being reviewed in the absence of an order actually granting or denying injunctive relief. Were § 1292(a)(1) to be extended to orders "effectively" granting or denying injunctions, the magnitude of the resulting increase in the federal ap-

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43. This possibility troubled the Third Circuit here. *Gardner, supra,* 559 F.2d at 212.

pellate work-load would certainly be considerable, with the possibility of one or more interlocutory appeals as of right in every class action and perhaps in all lawsuits seeking injunctive relief.[44]

The "in effect" rule would further burden the appellate courts with the task of determining in each case the jurisdictional question of whether the order appealed from had the "effect" of granting or denying an injunction. Professor Moore has criticized the attempts of litigators to characterize interlocutory orders as injunctive for purposes of obtaining appellate review under § 1292(a)(1), noting that "ingenious counsel have found injunctions lurking in virtually every ruling that a district court can be called upon to make." 9 Moore's Federal Practice ¶ 110.20[1], at 233 (2d ed. 1975). Acceptance of the *ad hoc* expansion of § 1292(a)(1) advocated by Petitioner would provide an impetus to attempts by litigants to appeal a variety of presently nonappealable district court orders. As this Court has recognized:

> "Any such *ad hoc* decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money." *Baltimore Contractors, supra,* 348 U.S. at 181.

Adoption of the "effective" grant or denial standard of appealability under § 1292(a)(1) would invite appeal of virtually every important interlocutory order in cases

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44. The "effective" grant or denial standard of appealability proposed by Petitioner would not seem to be limited to class action determinations, and there appears to be no articulable basis for so limiting it. The effect of the denial of class action status would not seem to be distinguishable from the effect of certain orders in individual actions such as those which deny joinder or grant dismissal short of the merits as to particular causes of action

where injunctive relief was sought, causing the final judgment rule to be swallowed up by what was intended as a narrow exception.[45]

In sum, any *ad hoc* expansion of § 1292(a)(1) to encompass orders "effectively" granting or refusing injunctive relief would have an adverse impact on federal judicial administration at both the trial and appellate levels by burdening the courts of appeals with unnecessary interlocutory appeals which would interrupt and delay the proceedings in the district courts.

In a case arising under 28 U.S.C. § 1253 of the Three Judge Court Act,[46] this Court has held that an interlocutory appeal will lie only from an order granting or denying a preliminary injunction. *Goldstein v. Cox,* 396 U.S. 471 (1970). The plaintiffs' complaint in that case had requested both preliminary and permanent injunctions ordering that they be paid sums held in an account. This Court held that an order denying plaintiffs' motion

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45. The opinion of the Third Circuit emphasized the risk of this potential outcome in rejecting the "in effect" standard of appealability:

> "[W]e would face in each case the question whether the particular refusal did or did not amount to the denial of an injunction. We would be faced with piecemeal review of that issue and the general rule of § 1291 and *Katz* [*v. Carte Blanche Corp., supra*] would be effectively swallowed up by the § 1292(a)(1) exception." *Gardner, supra,* 559 F.2d at 212.

46. That section, which is analogous to § 1292(a)(1), provides that direct appeal from a three-judge court may be taken to the Supreme Court "from an order granting or denying . . . an interlocutory or permanent injunction." Compare § 1292(a)(1) which provides for review of "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions."

for summary judgment was not appealable under § 1253. The opinion pointed out that there had been no denial of a preliminary injunction because plaintiffs had taken no steps to obtain such an injunction beyond requesting it in the complaint and because the release of funds could only have been ordered after final judgment so that "preliminary injunctive relief could never have been a practical possibility." 396 U.S. at 479. The denial of summary judgment obviously had the *effect* of denying plaintiffs a *permanent* injunction, and an actual denial would have been expressly appealable under § 1253. Yet despite the effect of the order, this Court did not find that an injunction had been denied. Although the "effect" of the order was not expressly at issue in *Goldstein,* the case stands firmly for the proposition that only orders which actually grant or deny injunctive relief are appealable under statutory provisions for interlocutory review of orders granting or refusing injunctions.

C. EVEN IF AN "EFFECTIVE" DENIAL OF INJUNCTIVE RELIEF WERE APPEALABLE UNDER § 1292(a)(1), THE DENIAL OF CLASS ACTION STATUS IN THE INSTANT CASE WAS NOT AN "EFFECTIVE" DENIAL OF INJUNCTIVE RELIEF.

Petitioner argues that the District Court's denial of class action status effectively precluded the putative class members from obtaining injunctive relief. [Petitioner's Brief at 13]. This assertion is simply incorrect. Class determinations are subject to possible revision, and the District Court may subsequently decide to grant class action status. Moreover, the District Court may grant injunctive relief in Petitioner's individual action which redounds to the benefit of members of the putative class. Furthermore, individual members of the puta-

tive class may intervene in the instant lawsuit if they wish to obtain injunctive relief. Thus, the actual scope of injunctive relief in this case, if any were to be granted, will not be known until after the trial on the merits has been conducted.

1. *Class Determination Decisions Are Inherently Subject to Possible Reconsideration and Revision.*

An interlocutory order denying class action status is tentative in nature and may be altered or amended by the trial court at any time prior to a final decision on the merits. Fed.R.Civ.P. 23(c)(1) provides that:

> "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. *An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.*" (emphasis supplied).

Petitioner argues that while a grant of class action status may be altered or amended, a denial of class action status may not be subsequently modified. [Petitioner's Brief at 20-21]. The express language of Rule 23(a)(1) makes no such distinction between orders which grant and those which deny class action status. Rather, the explicit language of the Rule provides that any class action determination order is subject to subsequent alteration or amendment.

This conclusion is consistent with the authority cited by Petitioner. Contrary to Petitioner's assertion,[47]

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47. Petitioner's Brief at 20.

the text of the *Proposed Rules of Civil Procedure, Advisory Committee's Note to Rule 23(c)(1),* 39 F.R.D. 69, 104 (1966), does not state that a denial of class action status cannot subsequently be altered or amended.[48]

Petitioner's argument that the denial of class certification cannot later be altered overlooks the District Court's inherent power to modify its interlocutory or-

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48. The Advisory Committee's Note simply states:

"A negative determination means that the action should be stripped of its character as a class action. . . . Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled. . . ."

The comments by the Advisory Committee are phrased in terms of the broad power of a district court to permit intervention and do not address the issue whether an order denying class status may be modified at a later date. Even assuming the Advisory Committee's comments actually said that an order denying class action status could not subsequently be altered, that interpretation would not be controlling because the express language of Rule 23(c)(1) provides that all class action determination orders may be altered or amended by the district court.

Similarly, this Court in *United Airlines, Inc. v. McDonald,* 432 U.S. 385, 398-99 (1977), did not declare that an order denying class action status was immune from subsequent alteration. Petitioner's apparent contention to the contrary is incorrect. [Petitioner's Brief at 20-21]. This Court in *McDonald* simply quoted the language of the Advisory Committee's comments set forth above and did not address the issue whether a negative class action determination order may later be modified by the trial court.

ders.[49] This Court repeatedly has recognized a trial court's inherent power to reconsider and alter its interlocutory orders or decrees before the entry of final judgment. As this Court has declared:

> "[T]he court did not lack power at any time prior to entry of its final judgment . . . to reconsider any portion of its decision and reopen any part of the case . . . . It was free in its discretion to grant a reargument based either on all the evidence then of record or only the evidence before the court when it rendered its interlocutory decision, or to reopen the case for further evidence." *Marconi Wireless Telegraph Co. of America v. United States,* 320 U.S. 1, 47-48 (1943) (citations omitted).

On another occasion, this Court similarly declared:

> "If it [the decree] be only interlocutory, the court, at any time before final decree, may modify or rescind it." *John Simmons Co. v. Grier Brothers Co.,* 258 U.S. 82, 88 (1921).

The lower courts have consistently applied the principle that a trial court is inherently empowered to alter or amend its interlocutory orders or decrees. *E.g., Braden v. University of Pittsburgh,* 552 F.2d 948, 954 (3rd Cir. 1977) (en banc); *Bon Air Hotel, Inc. v. Time, Inc.,* 426 F.2d 858, 862 (5th Cir. 1970); *Walsh v. City of De-*

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49. Petitioner's position is also contrary to the spirit of the Federal Rules of Civil Procedure. It is expressly provided in Fed.R.Civ.P. 82 that "[t]hese rules should not be construed to . . . limit the jurisdiction of the United States district courts. . . ." Similarly, the enactment of these rules would appear to have been intended not to restrict the inherent powers of the district courts.

troit, 412 F.2d 226, 227 (6th Cir. 1969) (per curiam). This principle is clearly applicable to interlocutory orders denying class action status. In *Walsh,* the district court originally held that the lawsuit could not proceed as a class action and ordered the class allegations stricken from the complaint. Upon reconsideration, the district court granted class action status and reinstated the class action portions of the complaint. In discussing the tentative nature of class action determination orders, the Sixth Circuit declared:

> "Even without this Rule [Fed.R.Civ.P. 23(c)(1)], the District Court had the power and authority to reconsider any of its orders entered during pendency of the case, which orders had not become final." *Walsh, supra,* 412 F.2d at 227.

Other lower courts also have recognized that district court orders which deny class action status or decertify a previously certified class action can subsequently be altered or amended by the trial court. *E.g., Lamphere v. Brown University,* 553 F.2d 714, 719 (1st Cir. 1977); *In re Piper Aircraft Distribution System Antitrust Litigation,* 551 F.2d 213, 217 (8th Cir. 1977); *Gerstle v. Continental Airlines, Inc.,* 466 F.2d 1374, 1377 (10th Cir. 1972); *Parker v. Kroger Co.,* 13 EPD ¶ 11,527, at 6892 (N.D. Ga. 1976); *Robinson v. Penn Central Co.,* 58 F.R.D. 436, 442 (S.D.N.Y. 1973).

Thus, the order denying class action status in the instant case was not an "effective" denial of injunctive relief. This interlocutory order was, and is, subject to

the District Court's inherent power of modification.[50] The scope of injunctive relief to be issued in the instant case, if any, will not be known until after trial on the merits of Petitioner's request for a permanent injunction. For this reason alone, there has been no denial of an injunction.

2. *The Full Scope of Injunctive Relief Which Could Be Granted in Petitioner's Individual Lawsuit Cannot Be Determined in Advance of a Final Decision on the Merits.*

Even if this case proceeds to trial as an individual action, the class may still benefit from any injunctive relief which may be granted to Petitioner, assuming, of course, that she proves her right to such relief. Where a court finds evidence of a practice or policy of discrimination, it need not permit its continued application to persons other than the named plaintiff and may issue an appropriately broad injunction.[51] Although Petitioner

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50. Similarly, the District Court's order regarding the scope of permissible discovery is subject to amendment or alteration prior to final judgment.

51. In *Gray v. International Brotherhood of Electrical Workers,* 73 F.R.D. 638, 640 (D. D.C. 1977), the court held that class action treatment of plaintiffs' Title VII claims was unnecessary because, if the individual plaintiffs prevailed on their claims, the court would be required to fashion "an appropriate equitable decree":

> "Such a decree would of course be directed toward the discriminatory practices alleged and would thus afford injunctive relief to all victims of such discrimination, not merely to the plaintiffs bringing this action."

See also, Brito v. Zia Co., 478 F.2d 1200, 1207 (10th Cir. 1973) (affirmed plant-wide injunction against test-

cites several cases for the proposition that an individual plaintiff can obtain only the relief to which he or she is entitled, none of these cases holds that such relief cannot extend to other persons similarly situated.[52]

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ing procedures despite affirmance of class certification denial); *Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 130 (6th Cir. 1971) (all employees would benefit from employee's complaint seeking general relief against a wide range of discriminatory practices); *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968) (individual suit challenging discriminatory employment practices "is perforce a sort of class action for fellow employees similarly situated"). *Cf. United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974) (affirmed denial of class certification because injunction against discriminatory refusal to extend city water and sewer systems would apply to all persons subject to the practice under attack); *Martinez v. Richardson*, 472 F.2d 1121, 1127 (10th Cir. 1973) (injunction against recoupment of Medicare benefits without a hearing could extend beyond named plaintiffs without use of class action); *Cousins v. City Council of Chicago*, 466 F.2d 830, 845 (7th Cir.), *cert. denied*, 409 U.S. 893 (1972) (individual plaintiffs had standing to challenge racially-motivated gerrymandering regardless of certification of class action); *Bailey v. Patterson*, 323 F.2d 201, 206-07 (5th Cir. 1963), *cert. denied sub nom., City of Jackson v. Bailey*, 376 U.S. 910 (1964) (class action unnecessary since desegregation of facilities would result from appropriate order in individual action).

52. Petitioner's Brief at 32-34. *Sperry Rand Corp. v. Larson*, 554 F.2d 868 (8th Cir. 1977), is not at all in point, the employer's petition for a writ of mandamus having been denied because the district court had not abused its discretion in certifying the class. The named plaintiffs in *Carracter v. Morgan*, 491 F.2d 458 (4th Cir. 1973), were unable to obtain injunctive relief for the uncertified state-wide class of plaintiff's against the uncertified state-wide defendant class of county chain gang

Neither *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), nor *East Texas Motor Freight System, Inc. v. Rodriquez*, 431 U.S. 395 (1977), supports Petitioner's assertion that class-wide relief is only possible in a class action. *Teamsters* is not at all germane, involving a "pattern or practice" action brought by the Government under Section 707(a) of Title VII, 42 U.S.C. § 2000e-6(a)(1970),[53] while in *Rodriquez* class-wide relief was held to be improper because the named plaintiffs had suffered no injury and

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administrators, but they *did* obtain a broad order desegregating the *entire* chain gang system in the county administered by the named defendants. *Washington v. Safeway Corp.*, 467 F.2d 945 (10th Cir. 1972), was a case in which plaintiff's claims were dismissed on the merits after he failed to allege or satisfy the Rule 23 prerequisites to a class action; the opinion says nothing about the scope of relief which could have been granted if plaintiff had prevailed in his individual action.

Danner v. Phillips Petroleum Co., 447 F.2d 159 (5th Cir. 1971), likewise sets no limitations on the possible scope of injunctive relief in an individual action, the district court having been reversed for granting relief to an uncertified class beyond that which in that case was necessary to make plaintiff whole. Furthermore, in *Danner* plaintiff had never advanced a claim on behalf of any class, so it was improper for the district court to consider awarding any relief to a class beyond the relief to which plaintiff was entitled as an individual. By contrast, the district court here, after hearing the merits of the case, could conceivably decide to reverse the class action denial and could then properly grant class-wide injunctive relief.

53. One holding of the *Teamsters* decision is that once a system-wide pattern and practice of discrimination has been proved, each applicant is presumptively entitled to relief unless the employer can demonstrate lawful reasons for his or her rejection.

were not proper representatives of the class they purported to represent.

Petitioner concedes that in certain circumstances "relief granted in favor of the named plaintiff will perforce operate to the benefit of the class", but she asserts that the facts of the instant case preclude such a broad remedial order. [Petitioner's Brief at 34 n. 10]. This assertion is contradicted by Petitioner's repeated allegations in the pleadings and in her brief that what is at issue are overall company policies and practices of discrimination against females. [Complaint, paragraph V. B., A. 10a-11a; Petitioner's Brief at 6]. In view of these contentions concerning general policies and practices which could be enjoined in Petitioner's individual action, the possibility cannot be ruled out that a broad injunction could be issued by the District Court if she prevails at the trial on the merits.

More importantly, however, Petitioner's argument that her appeal should be allowed because *in her particular case* the denial of class certification precludes injunctive relief for the class would create an unworkable standard of appealability under § 1292(a)(1). Following Petitioner's logic, the courts of appeals should review orders denying class certification only when the facts of the case demonstrate that the class cannot benefit from any injunction granted to the named plaintiff. Such a standard would necessarily involve the appellate courts in speculation and conjecture concerning the merits of actions, at a preliminary stage prior to the development of an adequate record, simply for the purpose of determining appealability under § 1292(a)(1). Once it is recognized that not all orders denying class certification will necessarily have the effect of precluding injunctive relief which benefits persons who are members of the putative class, it become impossible to articulate a practical standard for determining when the denial of class action status has the effect of an outright denial of injunctive relief. The effect of a denial of class certification on the scope of injunctive relief cannot reasonably be predicted in advance of a decision on the merits, and until that time, such an order is not appealable under § 1292(a)(1).

3. *Intervention By Members of the Putative Class May Affect the Scope of any Injunctive Relief That Might Ultimately Be Awarded.*

The possibility of intervention by additional plaintiffs is another reason why the denial of class certification does not necessarily have the "effect" of narrowing the scope of injunctive relief which might ultimately be awarded. Where class action status has been denied, members of the putative class may participate in the ongoing lawsuit by filing a petition for intervention pursuant to Fed.R.Civ.P. 24(b). *American Pipe and Construction Co. v. State of Utah,* 414 U.S. 538 (1974); *Miller v. Central Chinchilla Group, Inc.,* 66 F.R.D. 411 (S.D. Iowa 1975); *Barninger v. National Maritime Union,* 372 F.Supp. 908 (S.D.N.Y. 1974); *Hurley v. Van Lare,* 365 F.Supp. 186, 196 n.13 (S.D.N.Y. 1973), *rev'd on other grounds,* 497 F.2d 1208 (2d Cir. 1974), *rev'd,* 421 U.S. 338 (1975) ("permissive intervention is most appropriate where the court has determined a case unsuitable for class action treatment").[54]

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54. The Advisory Committee's Note to Rule 23 states that, after denial of class certification, "the court may still be receptive to interventions before the decision on the merits." 39 F.R.D. 69, 104 (1966).

Members of the putative class can assert their rights by intervening in Petitioner's lawsuit. The pendency of the class action claim would have tolled the running of the statute of limitations.[55] Intervention thus enables members of the rejected class to seek injunctive relief. The denial of class action status does not have the effect of denying them an injunction but simply requires that they personally intervene to seek that relief.[56] Thus, the possibility of intervention in the ongoing lawsuit is yet another reason why the denial of class certification does not inherently limit the scope of injunctive relief which may ultimately be awarded in the action.

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In sum, the order of the District Court does not necessarily have the effect of a denial of injunctive relief to members of the class. The District Court's interlocutory order on the class action question is inherently subject to reconsideration, so this lawsuit could again become a class action prior to any ruling on the request for injunctive relief. Even if the case proceeds as an individual action, the class could possibly benefit from any injunction which Petitioner might obtain, at least insofar as a broad policy or practice of discrimination were proved and enjoined. In any event, individual class members desiring injunctive relief can intervene in Petitioner's lawsuit. The order denying class certification does not inherently preclude members of the putative

55. *American Pipe and Construction Co. v. State of Utah, supra.*

56. *Williams v. Wallace Silversmiths, Inc.,* 566 F.2d 364, 367 (2d Cir. 1977) (per curiam). Rather than intervening, these persons could, of course, choose to institute their own individual lawsuits seeking injunctive relief.

class from obtaining injunctive relief. Hence, no interlocutory appeal of the denial of class action status would be warranted even if the "effect" of an order were controlling for purposes of § 1292(a)(1).

III. No Policy Reasons Justify the Requested Judicial Expansion of §1292(a)(1).

There are no policy reasons which would justify expanding § 1292(a)(1) to allow immediate appeal of an order denying class certification because, as shown below, procedures already exist which can appropriately protect putative class members from an erroneous denial of class certification.

A. CLASS ACTION DETERMINATIONS ARE FULLY REVIEWABLE AFTER FINAL JUDGMENT, EITHER BY NAMED PLAINTIFF OR BY ANY INTERVENORS.

While Petitioner asserts that it is "extremely probable" that the order denying class certification will never be reviewed unless an immediate appeal is allowed,[57] the fact of the matter is that such orders are fully reviewable after final judgment. As the Third Circuit emphasized in the instant case, appeal of a class action determination after final judgment "in no way diminishes the power of the court upon review to afford full relief."[58]

In his concurring opinion, Chief Judge Seitz analyzed the question whether an order denying class certification would be subject to review after final judgment. He determined that if Petitioner should be denied individual relief, "she could, of course, raise the

57. Petitioner's Brief at 49.

58. *Gardner, supra,* 559 F.2d at 212.

district court's failure to certify [a class] along with her other assignments of error on appeal after final judgment."[59] Chief Judge Seitz also determined that Petitioner could obtain review of the class action determination after final judgment even if she obtained all the individual relief requested at trial.[60] The concurring opinion concluded that:

> "[s]ince the district court's refusal to certify will always be appealable after final judgment, it can hardly be said that the court's decision has foreclosed the possibility that the class would ultimately be certified and class-wide relief granted." *Gardner, supra,* 559 F.2d at 219.

It is the rule under 28 U.S.C. § 1291 that appeal can be taken after a final decision on the merits of not only the final judgment but also of the various interlocutory rulings made during the proceedings; the interlocutory rulings, such as a class action determination, merge into the final judgment. *E.g., Williams v. Mumford,* 511 F.2d 363, 366 (D.C. Cir.), *cert. denied,* 423 U.S. 828 (1975). *See also* 9 Moore's Federal Practice, ¶ 110.07 at 107-109 (2d ed. 1975).

This Court acknowledged in *United Airlines Inc. v. McDonald,* 432 U.S. 385, 395 (1977), that a "District Court's refusal to certify [a class] was subject to appellate review after final judgment at the behest of the named plaintiff. . . ." The *McDonald* Court cited numerous appellate decisions that allowed a named plaintiff to appeal after final judgment a refusal to certify a class both where the named plaintiff prevailed on a individual

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59. *Id.,* at 214.

60. *Id.,* at 218-219.

claim and where the named plaintiff lost on an individual claim.[61] There is no question that if Petitioner wishes to appeal the order denying class certification after final judgment, the Third Circuit will review the District Court's decision. *Gardner, supra,* 559 F.2d at 212, 219. *Accord, Gellman v. Westinghouse Electric Corp.,* 556 F.2d 699, 701 (3d Cir. 1977).

Petitioner has erroneously cited this Court's recent decision in *East Texas Motor Freight System, Inc. v. Rodriquez,* 431 U.S. 395 (1977), for the proposition that a named plaintiff would lack standing to appeal an order denying class certification following the loss of his or her individual case.[62] *Rodriquez* simply does not support that proposition.

Rodriquez was a Title VII action where the named plaintiffs tried their individual claims and did not move for class certification until after trial.[63] The Fifth Cir-

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61. *McDonald, supra,* 432 U.S. at 395 n. 14. The Court cited *Galvan v. Levine,* 490 F.2d 1255 (2d Cir. 1973), and *Esplin v. Hirshi,* 402 F.2d 94 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969), decisions allowing a named plaintiff to appeal the trial court's refusal to certify after having prevailed on an individual claim. The *McDonald* opinion also cited *Zenith Laboratories, Inc. v. Carter-Wallace, Inc.,* 530 F.2d 508 (3d Cir. 1976), *Penn v. San Juan Hospital, Inc.,* 528 F.2d 1181 (10th Cir. 1975), *Bailey v. Ryan Stevedoring Co.,* 528 F.2d 551 (5th Cir. 1976) and *Haynes v. Logan Furniture Mart, Inc.,* 503 F.2d 1161 (7th Cir. 1974), decisions allowing named plaintiffs who were unsuccessful on their individual claims to appeal the trial court's refusal to certify a class.

62. Petitioner's Brief at 46.

63. *Rodriquez, supra,* 431 U.S. at 400. The trial court denied class certification because plaintiffs (i) failed to promptly move for certification, (ii) concentrated on individual claims at trial, (iii) stipulated that

cuit reversed the district court's denial of the post-trial class certification motion, and then itself certified the class and found class-wide liability. This Court vacated the Fifth Circuit's judgment in *Rodriquez* because it was clear, based on that particular record, that the named plaintiffs were not adequate class representatives under Fed.R.Civ.P. 23(a).[64] At no point did the Court hold or even indicate in *Rodriquez* that the issue of class certification was moot because the named plaintiffs had lost their individual claims. In fact, the trial court's class action determination was reviewed by this Court and found to be consistent with Rule 23.[65] The Court did not remand *Rodriquez* with instructions ordering the trial court to dismiss the complaint, as it had done previously when a case was moot,[66] but instead remanded *Rodriquez* for further proceedings. The Fifth Circuit affirmed the trial court on remand. *Rodriquez v. East Texas Motor Freight,* 560 F.2d 1286 (5th Cir. 1977).

After *Rodriquez* was decided, this Court held in *United Air Lines, Inc. v. McDonald, supra,* that a putative class member's intervention to appeal an adverse class determination was timely in an action where the plaintiffs had previously settled their individual claims and a judgment of dismissal had been entered. The hold-

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the only issue to be determined concerned the employer's failure to act on plaintiffs' employment applications and (iv) sought class relief that the alleged class had previouly rejected. The trial court also held against the named plaintiffs on their individual claims.

64. *Rodriquez, supra,* 431 U.S. at 403-405.

65. *Rodriquez, supra,* 431 U.S. at 406.

66. *See, e.g., Indianapolis School Commissioners v. Jacobs,* 420 U.S. 128, 130 (1975).

ing in *McDonald* negates any suggestion that the class determination question was moot in light of the settlement of individual claims, or that the intervenor lacked standing to appeal.[67] Since this Court did not hold the class determination issue in *McDonald* to be moot where the original plaintiff's claims had been settled and dismissed, the instant Petitioner's assertion—that an appeal of the class issue by a plaintiff who has fully litigated a claim to final judgment will somehow be dismissed for lack of standing—is not plausible. And, if a class can be certified after the named plaintiffs settle and dismiss their individual claims, as indicated by *McDonald,* then a class can presumably be subsequently certified after the named plaintiffs lose their individual claims.[68] Thus, contrary to Petitioner's assertion,[69] the failure of an individual claim is not dispositive of the class certification question. Petitioner will be able to obtain review of the denial of class certification regardless of the outcome of her individual lawsuit.

The possibility that the named plaintiff will lack incentive to appeal the adverse class determination if

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67. The Court stated "it would be circular to argue that an unnamed member of the putative class was not a proper party to appeal, on the ground that her interest had been adversely determined by the trial court." *McDonald, supra,* 432 U.S. at 394-95. Moreover, the Court also stated that if the intervenor were successful on review of the order denying class certification, it would result in the certification of a class. *Id.* at 392.

68. It is obvious that a class can subsequently be certified if the denial of the named plaintiff's individual claim is reversed on appeal. *E.g., Haynes v. Logan Furniture Mart, Inc., supra.*

69. Petitioner's Brief at 46.

she obtains a favorable judgment on her individual claim cannot serve to justify the immediate appeal of class action denials. The suggestion that Petitioner may not want to appeal after final judgment,[70] whether out of pure whimsy or for economic reasons, is hardly a policy consideration upon which to base immediate appealability. In any event, it is likely that a named plaintiff would appeal an adverse class determination after favorable final judgment because it might lead to a greater net recovery by reducing the proportion of plaintiff's individual recovery going to his attorney. In fact, the named plaintiffs in several cases have appealed adverse class determinations after prevailing on their individual claims. *E.g., Galvin v. Levine,* 490 F.2d 1255 (2d Cir. 1973); *Esplin v. Hirshi,* 402 F.2d 94 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969).

But even if somehow a named plaintiff lacked incentive after final judgment to appeal an order denying class certification, the order could still be reviewed. Intervention is available for class members who seek to prosecute a case through the appellate process in hopes of reversing an adverse class determination, if for any reason the original plaintiff cannot or does not appeal. *United Air Lines v. McDonald, supra.* The right to appeal the trial court's refusal to certify a class is not limited to those whose individual claims were determined. If any member of the putative class proceeds in an individual action, *McDonald* indicates that the class certification can be challenged on appeal by named or unnamed members of that class. The *McDonald* decision protects putative class members who wish to intervene even after final judgment to appeal an order

70. Petitioner's Brief at 48.

denying class certification. In *McDonald,* a putative class member intervened for purposes of appealing the class action denial after the individual action had been settled. The intervention was held timely because the motion was filed within the time period in which the named plaintiffs could have taken an appeal.[71] Putative class members who had previously intervened to try their individual claims would presumably also be able to appeal the class action determination after final judgment, since a putative class member in *McDonald* who had not even tried her individual claim had standing to appeal the class determination.

Intervention enables members of the putative class to protect their individual rights as well as their rights as class members. An order denying class certification does not deprive any putative class member of a timely individual claim. As was previously discussed,[72] putative class members can intervene for the purpose of trying their individual claims if class certification is denied. *American Pipe and Construction Co. v. Utah,* 414 U.S. 538 (1974). The Court there made clear that the statute of limitations is tolled prior to an adverse ruling by the trial court upon the class determination motion. Accordingly, intervention is available after the denial of class certification for any putative class members who may want an immediate trial of their individual claims or who may want to be protected in the event

71. *McDonald, supra.,* 432 U.S. at 390.

72. *See* discussion, *supra,* at 51-53.

that the district court's denial of class status is subsequently affirmed.[73]

In sum, expanding §1292(a)(1) to allow immediate appeal of an order denying class certification is certainly not necessary to ensure appellate review of such orders. Class action determinations are fully reviewable after final judgment either at the behest of the named plaintiff or any intervenors.

B. If a Suit Concerns a Situation of Potential Immediate or Irreparable Harm to a Putative Class, Preliminary Injunctive Relief Is Possible Before Class Determination.

The instant action clearly does not involve potential immediate and irreparable harm to a putative class. In fact, Petitioner admitted in her answers to Interrogatories to Plaintiff that her primary motivation in bringing this lawsuit was to secure employment for herself. (A. 121a). Preliminary injunctive relief was neither requested in the Complaint nor sought by Petitioner. Moreover, Petitioner filed an EEOC charge and then waited over three years before filing suit. (A. 16a, 1a). The admission and the lengthy delay in filing suit belie

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73. The Court of Appeals for the Fifth Circuit has recently determined that, where class action status has been denied, intervenors in a Title VII case need not separately exhaust the special statutory prerequisites to suit of filing an EEOC charge and obtaining a right to sue letter if one of the original plaintiffs has satisfied these requirements. *Wheeler v. American Home Products Corp.*, 563 F.2d 1233 (5th Cir. 1977). Under *Wheeler*, if an original plaintiff filed an EEOC charge and received a right to sue notice from the Commission pursuant to 42 U.S.C. §§2000e-5(e), 5(f)(1), putative class members can intervene without exhausting administrative remedies.

Petitioner's representations to this Court that immediate appellate review is necessary because of immediate and irreparable harm to the putative class.[74] If this action truly involved the potential for such harm, Petitioner could have requested a right to sue notice after only 180 days following the filing of the charge and initiated this action two and one-half years before she did. 42 U.S.C. §2000e-5(f)(1). *See, e.g., Tuft v. McDonnell Douglas Corp.*, 517 F.2d 1301, 1307-08 (7th Cir. 1975); *Equal Employment Opportunity Commission v. E. I. duPont de Nemours & Co.*, 516 F.2d 1297, 1300-01 (3rd Cir. 1975).

Where an alleged class action does involve potential immediate and irreparable harm, preliminary injunctive relief is available and should be sought. The denial of a Fed.R.Civ.P. 65 motion for a preliminary injunction is precisely the type of order which can be appealed under §1292(a)(1).

It is well settled that preliminary injunctive relief to protect a putative class can be sought and granted in advance of a ruling as to the maintainability of a class action. *E.g., Lawrence Bicentennial Commission v. City of Appleton, Wisconsin*, 409 F.Supp. 1319, 1327 (E.D. Wis. 1976); *Chance v. Board of Examiners*, 330 F.Supp. 203, 206 n. 8 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167, 1169 n. 2 (2d Cir. 1972).[75] This Court has acknowledged the

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74. Petitioner's Brief at 44.

75. In other cases courts have granted classwide preliminary injunctive relief without any mention of the class certification question. *E.g., Swansey v. Elrod*, 386 F.Supp. 1138 (N.D. Ill. 1975); *Negron v. Preiser*, 382 F.Supp. 535 (S.D.N.Y. 1974); *Salandich v. Milwaukee County*, 351 F.Supp. 767 (E.D.Wis. 1972).

propriety of a preliminary injunction in advance of class certification in *Elrod v. Burns*, 427 U.S. 347, 373 (1976). There, the Court affirmed the Seventh Circuit's directive[76] that the district court issue a preliminary injunction which it had previously denied and then determine the appropriateness of the class action.[77] Thus, in the situations where potential immediate and irreparable harm to a putative class exists, the named plaintiff need only file a Rule 65 motion for preliminary injunctive relief.

Both Petitioner and Judge Gibbons in his dissent on the denial of rehearing en banc have suggested that immediate appeal of all class action denials is necessary because a district court judge may be "unfavorably disposed"[78] or inhospitable[79] to class actions or certain areas of the law. It should be pointed out that the hypothetical situation posed by Judge Gibbons—that an "unfavorably disposed" district court judge might try to shield his unwillingness to grant *pendente lite* relief behind an adverse class determination—is not really presented in this case because no motion for preliminary injunctive relief was ever filed or heard in the District Court. Thus, this case does not concern the questions which might be involved in an appeal taken from a ruling upon a motion for a preliminary injunction heard by a district court after the denial of class action status. Regardless of whether, in some circumstances, an appellate court might have jurisdiction under §1292(a)(1) to consider certain aspects of an adverse class determination in connection with an appeal from a subsequent trial court decision upon a motion for preliminary injunction, there was no such jurisdiction in the instant case in the Third Circuit and this issue is not presently before this Court.

76. *Burns v. Elrod*, 509 F.2d 1133, 1136-37 (7th Cir. 1975).
77. *Elrod, supra*, 427 U.S. at 373.
78. *Gardner, supra*, 559 F.2d at 222.
79. Petitioner's Brief at 52.

In any event, we respectfully submit that it is not appropriate to distort the rules on appealability based on the assumption that district court judges will act in a duplicitous manner or otherwise abuse their authority. Moreover, a trial court cannot shield the denial of preliminary injunctive relief from appellate review if the named plaintiff promptly moves for such relief. In the exceptional situation where immediate injunctive relief for a class is allegedly needed, the proper course of action for a plaintiff is to request a Rule 65 hearing immediately upon filing the complaint. Where preliminary injunctive relief is sought immediately after the filing of the action, the trial court cannot delay its decision or refuse to act because that in itself is appealable as the denial of injunctive relief. *E.g., Cedar Coal Co. v. United Mine Workers*, 560 F.2d 1153, 1161 (4th Cir. 1977); *United States v. Lind*, 301 F.2d 818, 822 (5th Cir. 1962), *cert. denied*, 371 U.S. 893 (1962).[80]

80. In a situation where preliminary injunctive relief is necessary and a Rule 65 motion has been filed, it would be virtually impossible for even the hypothetical inhospitable trial judge to accelerate a class action determination so as to deny a class, and then deny a preliminary injunction because of the adverse class determination, since plaintiffs typically have several months within which to move and brief the class certification question. But if a trial court somehow cut short the class certification proceedings simply for the purpose of arbitrarily denying class-wide *pendente lite* relief, the appellate court would have the power to correct the situation under the All Writs Act through use of man-

In sum, a general rule on the appealability of class action denials should not be shaped on the basis of highly unlikely hypotheticals or upon the assumption that the federal trial bench would act in a duplicitous manner. This is particularly true since there are already sufficient safeguards, such as preliminary injunctive relief and mandamus, to protect putative class members from potential immediate and irreparable harm in an extraordinary situation.

C. In Appropriate Circumstances, Immediate Review of Adverse Class Determinations Can Be Obtained Under §1292(b) or the All Writs Act.

Petitioner claims that appealability under §1292(a)(1) should be extended to interlocutory orders denying class action status in order to avoid alleged serious harm to members of the putative class.[81] Assuming *arguendo* that such harm might in fact take place, it does not follow that the narrow confines of §1292(a)(1) should be expanded to provide immediate appellate review of adverse class determination orders. There are alternative, and arguably preferable, means available to obtain immediate review of such interlocutory orders in appropriate circumstances.

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damus proceedings, 28 U.S.C. §1651. *See* discussion, *infra*, at 67. Therefore, a rule that orders denying class certification are not appealable under §1292(a)(1) hardly allows an unfavorably disposed district court judge "to shield from appellate review his unwillingness to grant *pendente lite* relief to the class." *Gardner, supra*, 559 F.2d at 222 (Gibbons, J., dissenting from the denial of rehearing en banc).

81. Petitioner's Brief at 43 et seq.

It should be pointed out that Petitioner did not even attempt to have the denial of class action status in the instant case certified for appeal under 28 U.S.C. §1292(b). The federal courts of appeals, including the Third Circuit, have entertained appeals from class action determination orders under §1292(b). *E.g., Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3rd Cir. 1974) (en banc), *cert. denied*, 419 U.S. 885 (1974); *Wilcox v. Commerce Bank of Kansas City*, 474 F.2d 336 (10th Cir. 1973); *Zahn v. International Paper Co.*, 469 F.2d 1033 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969).[82]

The Third Circuit has held that §1292(b) is the proper means to obtain interlocutory appeal of such orders. *Gardner, supra*, 559 F.2d at 211 n. 3; *Katz, supra*, 496 F.2d at 752. The Second Circuit in *Parkinson v. April Industries, Inc.*, 520 F.2d 650, 655 n. 5 (2d Cir. 1975), has stated that "this method [1292(b)] is obviously the most efficient way of securing interlocutory appellate adjudication, and perhaps should be the only way by which a class action designation issue could interlocutorily reach an appellate court." The advantages of the discretionary nature of appealability under §1292(b) were succinctly explained in the following manner by a report to the Judicial Conference of the Tenth Circuit which is included in the legislative history of this statute:

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82. The commentators agree that class determination orders should be appealable under §1292(b). *E.g.*, Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 390 n. 131 (1967); *Report of the American Bar Association Special Committee on Federal Rules of Procedure*, 38 F.R.D. 95, 104-105 (1965).

> "Requirement that the Trial Court certify the case as appropriate serves the double purpose of providing the Appellate Court with the best informed opinion that immediate review is of value and at once protects appellate dockets against a flood of petitions in inappropriate cases." S. Rep. No. 2434, 85th Cong., 2d Sess., 15 (1958), *reprinted in* [1958] 3 U.S. CODE CONG & AD. NEWS 5262.

The availability of §1292(b) "removes any incentive to enlarge by a liberal construction the class of orders appealable under section 1292(a)." *Cord v. Smith,* 338 F.2d 516, 521 (9th Cir. 1964). *Accord, Chappel & Co. v. Frankel,* 367 F.2d 197, 204 (2d Cir. 1966) (en banc). Section 1292(b) provides, in appropriate circumstances, an avenue for immediate discretionary review of interlocutory orders and, at the same time, protects the appellate courts from a flood of frivolous appeals. Section 1292(b) was enacted a few years after, and doubtless in response to, this Court's decision in *Baltimore Contractors.* In providing a procedure for interlocutory appeals it is noteworthy that Congress selected a process allowing discretionary interlocutory appeals rather than expanding the situations where an interlocutory appeal is obtainable as of right.[83]

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83. The Third Circuit in *Hackett v. General Host Corp.,* 455 F.2d 618, 624 (3rd Cir.), *cert. denied,* 407 U.S. 925 (1972), observed that mandamus is available as a remedy in situations of possible arbitrary refusal by a trial court to certify a question for appeal under §1292(b):

> "We have had no indication that the district courts of this circuit will reject applications under §1292(b) . . . arbitrarily . . . . If in isolated instances arbitrariness creeps in, there remains the ultimate remedy of mandamus." (citations omitted).

Thus, §1292(b) affords the opportunity to immediately appeal orders denying class certification in situations involving controlling questions of law where prompt review will materially advance the litigation. There is, therefore, no need to strain the interpretation of §1292(a)(1) and allow a flood of piecemeal appeals since there already is an adequate method for seeking review of such interlocutory orders.

Moreover, there is no reason to expand §1292(a)(1) for the purpose of dealing with the rare trial court that is truly unfavorably disposed to class actions. The writ of mandamus is available for such isolated situations. *See, e.g., Anschul v. Sitmar Cruises, Inc.,* 544 F.2d 1364, 1368 n. 5 (7th Cir.), *cert. denied,* 429 U.S. 907 (1976); *Parkinson v. April Industries, Inc.,* 520 F.2d 650, 660 (2d Cir. 1975) (Friendly, J., concurring); *Hackett v. General Host Corp.,* 455 F.2d 618, 624 (3d Cir.), *cert. denied,* 407 U.S. 925 (1972). The All Writs Act, not §1292(a)(1), is the means by which courts of appeals exercise supervisory control over the district courts in exceptional circumstances. *LaBuy v. Howes Leather Co.,* 352 U.S. 249, 259-260 (1957). The writ of mandamus is appropriately issued where there is usurpation of judicial power or a clear abuse of discretion. *Schlagenhauf v. Holder,* 379 U.S. 104, 110 (1964).

* * *

There are, therefore, no sound reasons to expand §1292(a)(1) and allow piecemeal review as urged by Petitioner.[84] The availability of intervention, review of the class determination after final judgment, preliminary injunctive relief, interlocutory appeal under §1292(b) and the writ of mandamus combine to fully protect putative class members from the effect of a wholly erroneous class action denial. And, while additional pro-

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84. Petitioner's Brief at 40 n. 13 presumably suggests that, if the Court rules against her on the question concerning which the writ of certiorari was granted, it should consider the appealability of the order denying class certification pursuant to §1291. [Petitioner cites §1292(a)(1) but it is presumed from the context that §1291 is intended.] Petitioner's request is improper and should be disregarded by the Court.

The sole question presented for review in the Petition for Certiorari is the appealability of the order under §1292(a)(1). The Petition contained no reference to any question of appealability under §1291, nor was that section even cited therein. Furthermore, the question of appealability under §1291 was neither raised nor passed upon in the Court of Appeals.

Rule 23.1(c) of the Rules of the Supreme Court provides that "[o]nly the questions set forth in the petition [for certiorari] or fairly comprised therein will be

ceedings may be necessary in the trial court if an order denying class action status is reversed after final judgment, that delay will probably be no greater, and may be less, than that caused by the immediate appeal of a class action determination order.

The present case has already been delayed two years by Petitioner's attempted interlocutory appeal. If she had tried her individual action—which would not have taken a great deal of time—and had appealed after final judgment, the Third Circuit might have already reviewed the adverse class determination.

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considered by the court." Review is thus limited to questions specifically raised in the petition for certiorari; questions not mentioned in the petition are not properly before the Court for consideration. *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 374 n. 60 (1977); *Andrews v. Louisville & Nashville R. Co.,* 406 U.S. 320, 324-25 (1972); *Irvine v. California,* 347 U.S. 128, 129-30 (1954); *Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board,* 301 U.S. 142, 146 n. 4 (1937). Further, the question of the applicability of §1291 in this case was not raised before the Third Circuit. This Court has consistently refused to pass upon issues which were raised neither in the court of appeals nor in the petition for certiorari. *E.g., Federal Trade Commission v. Simplicity Pattern Co.,* 360 U.S. 55, 61-62 n. 4 (1959); *Lawn v. United States,* 355 U.S. 339, 362-63 n. 16 (1958).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals for the Third Circuit dismissing the appeal from the District Court's order denying class certification should be affirmed.

Respectfully submitted,

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ADDENDUM A

FED.R.CIV.P. 23. CLASS ACTIONS

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.